IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, *Plaintiff in Error*, *vs.* M. A. HUNT AND MARY A. HUNT, *Defendants in Error.*	No. 2546

BRIEF OF DEFENDANTS IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

F. E. HAMMOND,
J. M. HAMMOND,
T. F. BEVINGTON,
Attorneys for Defendants in Error.

602 Mutual Life Building, Seattle, Washington.

KLEMPTNER & BOYCE

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation *Plaintiff in Error* *vs.* M. A. HUNT AND MARY A. HUNT, *Defendants in Error.*	No. 2546

BRIEF OF DEFENDANTS IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

SPECIFICATION OF ERROR I.

The plaintiff in error contends that the Court erred in overruling the defendants' challenge to the

sufficiency of the evidence to sustain a verdict for plaintiffs.

Whether or not the Court erred in overruling the defendant's challenge to the sufficiency of evidence and in refusing to instruct the jury to return a verdict for the defendant, is a legal proposition, which raises the question as to what is the duty of a trial court under the facts as established by the testimony.

The general rule is that:

> "Only in the clearest cases, where the facts are undisputed and where all intelligent men can draw but one inference, is the question of contributory negligence for the Court, and especially is this true when the measure of duty is ordinary and reasonable care;"

Kett vs. Colorado & S. Ry. 146 Pac. 245 Colo.

Williams vs. Sleepy Hollow M. Co., 37 Colo. 69; 72 L. R. A. (N.S.) 1170; 86 Pac. 339.

Railroad Company vs. Van Steinburg, 17 Mich. 120.

Briggs vs. Taylor 28 Vt. 183.

Phillips vs. Denver City Tramway Co. 128 Pac. 460 (Colo.)

"Where the circumstances are such that

minds of ordinary intelligent men differ as to the question of negligence, it must be left to the jury, and it is always a question to be determined by that body when the measure of duty is ordinary and reasonable care."

Rimmer vs. Wilson, 42 Colo. 180; 93 Pac. 1110.

Phillips vs. Denver City Tramway Co. 128 Pac. 460 (Colo.)

"If the facts are disputed, the question is for the jury, and even if the facts are undisputed, but different inferences may be drawn from them, it is a question for the jury; but if the facts are not disputed and but one inference can be drawn from them by reasonable, prudent men, the question of negligence is for the Court."

Wade vs. Empire District Electric Co. 147 Pac. 63 (Kan.)

77 Wash. 564.

205 Fed. 833.

The brief of Council for the plaintiff in error seems to be predicated upon the supposition that the defendant in the lower Court was not guilty of negligence, and that the plaintiff in the Court below, was guilty of negligence, and such negligence of the said plaintiff was the proximate cause of the injury. Of

course, if the proven facts in this case established that assumption, the plaintiffs could not recover. That the defendant in the Court below was guilty of negligence is proven by the undisputed testimony of the defendants' witnesses, who testified that the speed of the street car was in excess of the limit fixed by law. The street car which caused the damage was exceeding the speed limit, both under the Ordinances of the City and the Statute of the State. That act under all the decisions, is negligence per se.

It was the contention of the defendant in the Court below, that the plaintiff, M. A. Hunt, was negligent in the operation of his automobile, and that such negligence contributed to the injury of the plaintiff and was the proximate cause thereof.

The burden of proving that the plaintiff was guilty of contributory negligence was upon the defendant, and the question as to whether or not the said plaintiff was guilty of contributory negligence was a question for the jury, in-as-much as the evidence was contradictory, the case was properly submitted to the jury for its determination, and the jury found in favor of the plaintiffs.

As stated by the Court in passing upon the motion of the plaintiff in error for a directed verdict. (p 235 Tr.)

> The Court: "I was going to give you my view upon that phase. Irrespective of some other elements that might enter into the case there is some testimony here that this automobile ran up to the street-car track, right near it, and stopped and was there, and the motorman of the approaching car could see him for a sufficient distance to stop the car."

The question of the negligence of the plaintiff in the Court below, as to speed and under all the proven circumstances, was a disputed question submitted to the jury on conflicting evidence, and upon these disputed facts and the credibility of the witnesses, the jury, under proper instructions, by their verdict determined that the plaintiff was not negligent, or if negligent, that his negligence was not the proximate cause of the injury.

Counsel for plaintiff in error cites Section 2331 of Rem. & Ballinger's Code, and Statutes of Wash. (p. 35 of Brief); and urges that the defendant in error was guilty of contributory negligence, because his automobile passed from 27th Avenue North into East Cherry street at a rate of speed exceeding four miles per hour, or one mile in fifteen minutes, because of the fact that a person was standing on the side-walk on the

northwest corner of the intersection of 27th Avenue with East Cherry street.

By referring to Exhibit 1 of the defendants in error, the Court will observe that there is considerable of a jog in 27th Avenue; that is to say, 27th Avenue as it passes north from East Cherry Street, is some distance east of the point where 27th Avenue runs into east Cherry Street from the south.

The statute referred to means that, if a person were standing or walking on the crossing of 27th Avenue on the *south* side of East Cherry Street, an automobile should not be run from the south into east Cherry Street, or across said crossing at a rate of speed exceeding four miles per hour; it has no reference to a pedestrian who might be walking across the north crossing of 27th Avenue; but, if the person driving the automobile intended to proceed further north on 27th Avenue, and a pedestrian was upon the north crossing, or passing across the street on the north crossing of 27th Avenue, the automobile should not be run across that crossing at a speed in excess of four miles per hour.

The evidence in this case shows that there were no pedestrians or vehicles in the street near the intersection of 27th and East Cherry Street nor on or near

the *south crossing* of 27th Avenue, where the said 27th Avenue runs into East Cherry Street, and an automobile could pass into 27th Avenue from the south at a speed of eight miles per hour.

The defendant in error, Hunt, could not see the approaching street-car until after he had passed the apartment house and into East Cherry Street; and, after passing the apartment house obstruction and the covered delivery wagon and telephone pole obstructions and be in a position where he could see the street-car, the momentum of the automobile would, of itself, carry the automobile a few feet before he could apply the brakes.

Counsel for plaintiff in error seems to make light of the contention of the defendants in error that the covered delivery wagon or telephone pole, obstructed the view of the defendant in error, M. A. Hunt, saying, that the street-car was such a large object that the defendant in error, Hunt, should have seen it. It is within the knowledge of all men, and is a rule of optics, that a very small object near a person will prevent the seeing of a very large object some distance away; and, a person might stand so close to a very small telephone pole and, by reason of the proximity, it would obstruct his view of one-half of a City of 100,000 people, and yet, at the same time, a person

1000 feet away in a street-car could see him, unless the telephone pole entirely covered his body. This is merely by way of illustration, and illustrates the fact that while the motorman on the car might have seen and did see the automobile coming around the corner of the apartment house, the defendant in erro , by reason of the obstruction of his view, would not be able to see the street-car for quite a distance away. As the defendant in error passed the corner of the apartment house, the extreme front end of the automobile, or radiator, was nine feet in advance of where the driver, Hunt, was sitting.

An examination of the cases cited by the plaintiff in error, as sustaining its contention that the defendant in error was guilty of contributory negligence, as a matter of law, will disclose the fact that there is a great difference between the cases cited by Counsel for plaintiff in error, and the case at bar.

As to the relative rights of street-cars, pedestrians and drivers of vehicles upon the streets of a City, see:

Oberstock vs. United Rys. Co. 137 Pac. 195 (Ore.)

3 *Elliott on Railroads* (2 ed.) Sec. 1093.

The defendant in the case at bar cited, amongst others, the case of:

Denver City Tramway Co. vs. Norton et al., 141 Fed. 599.

For the purpose of showing that the Company in the operation of its street-cars had a right superior to the plaintiff upon the street in the operation of its car. We hardly deem it necessary to notice this claim of the defendant, it being so inapplicable to the facts of this case. However, we call the Court's attention to the following paragraph from the same opinion:

> "While the street railroad company has this preferential right of way, it has no right to proceed upon the assumption that it may take no heed of the probability of encountering, at such crossings in a city, vehicles and the like, which have the right to use the crossing as a common high-way. The motorman, in control of the operation of his car, must at all times, in approaching such crossings, proceed with such care and caution as, while subserving the public in rapid transit, he can reduce to the minimum the danger to others entitled to its contemporaneous use."

The Court in speaking of the preferential right of way, undoubtedly is speaking of that part of the street occupied by the tracks of the company, and even that must be used as above stated by the Court. The right of way spoken of means, as we understand, the space occupied by the tracks and does not mean the right or permission to run along without heed of the

danger to others, and this right is based upon the fact that the street cars are confined to their tracks and refers more particularly to where a pedestrian or driver of a vehicle undertakes to drive along in front of and in the same direction as a street car; and under such circumstances, the street car company has a perfect right, and the driver of a vehicle has no right to thus obstruct the way; but, we submit that the case before the Court is not of that nature.

SPECIFICATION II.

We desire to call the Court's attention to the manner in which the instructions excepted to by the defendant are presented to this Court. The Court will observe by reference to the Transcript, pages 243, 244 and 245 of the Record, that the defendant has not presented to this Court the whole of the paragraphs of the instructions of the trial Court, upon which it specifies error. It will be conceded, we think, upon all hands, without the citation of authorities, that in considering instructions to a jury, by way of objections, that the instructions must be read as a whole, and we submit that the instructions of the trial Court when read as a whole are not open to the criticism of the defendant in the case.

In the same paragraph of the Court's instructions

of which defendant's Specification No. II. is a part, and which as a continuation follows the instruction complained of in defendant's brief is the following:

> "An when both parties, the plaintiff and defendant, run at excessive rates of speed it is for the jury to determine the conduct or negligence of which was the proximate cause of the injury."
>
> (p. 245 Record.)

Again, the trial Court in its instructions to the jury said:

> "The fact that you may find that the automobile was driven at a greater rate of speed does not preclude recovery in this case if you should find that the rate of speed at which the automobile did cross the street there, was not the proximate cause of the injury, but that the operation of the street car was the proximate cause which resulted in the injury."
>
> (p. 246 of Record.)

So that the Court all through his instructions to the jury, impressed upon the jury's mind that the plaintiff could not recover, if his negligence, if any, was the proximate cause of the injury, and the jury could

not have been mislead by a mere isolated phrase of the instructions.

SPECIFICATION OF ERROR NO. III.

The Court's attention is called especially to defendant's Specification of Error No. III., in which the plaintiff in error criticises the trial Court, and copies a part of the instruction to which the error refers. The instruction does not warrant the criticism.

Counsel for plaintiff in error construes the instruction to mean that, the plaintiff in the lower Court would be entitled to recover, even though his negligence was the proximate cause of the injury. That is not what the instruction complained of says. The Court in that instruction was instructing the jury upon the *burden of proof*, and said: "The burden of proof would be upon the Company to show that it was in fact not negligent * * * and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof." The words omitted from the above quotation are: "even though the car was running at such excessive rate of speed." We submit that the Court correctly stated the law. When it is conceded that the street car company exceeded the speed limit, such being negligence per se, the burden of proof is upon the street car company to show

that it was in fact not negligent, and that the injury occasioned was caused, not by its negligence, but by the negligence of the plaintiff, and that the negligence of the plaintiff was the proximate cause of the injury. This instruction means that if the street car was running at an excessive rate of speed and was guilty of negligence in the first instance, which in the absence of negligence upon the part of the defendant, would have been the proximate cause of the injury, and the automobile was also running at an excessive rate of speed, then the burden of proof was upon the defendant to show that the negligence of the plaintiff was the proximate cause of the injury; in other words, it was the duty of the jury to ascertain, and by their verdict find, where the plaintiff and defendant were both guilty, whose negligence was the proximate cause of the injury.

By transposing the words: "even though the car was running at such excessive rate of speed," and placing it at the end of the instruction, as quoted by the defendant, Counsel for plaintiff in error would be unable to criticise the instruction in any manner.

At the time the plaintiff in error sought to sue out a Writ of Error to this Court, defendants in error realizing the inadequacy of the verdict, were willing that a new trial might be granted in the cause, and so

stated to the lower Court. Counsel for plaintiff in error would not make a motion for a new trial, and declined to submit to the Court any request for the corrections of any supposed errors committed by the lower Court, choosing to add many hundred dollars of costs, rather than have a new trial.

The transcript of record contains the entire stenographic report of the trial; much of the evidence submitted and taken to this Court is unnecessary, and in view of the fact that the defendants in error were willing to have a new trial granted in this cause, we submit that in case of a reversal of this cause, the costs in the case should be taxed against the plaintiff in error.

There being no error committed by the lower Court, the judgment should be affirmed.

F. E. HAMMOND,
J. M. HAMMOND,
T. F. BEVINGTON,
Attorneys for Defendants in Error.